## CHIN CHEE KOW v. PEGUAM NEGARA MALAYSIA

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[JUDICIAL REVIEW NO: PA-25-17-04-2016]
30 SEPTEMBER 2019

***TRUSTS:*** *Trusts and trustees – Public charitable trust – Applicant applied for consent from Attorney General to apply to be made as trustee or replace present trustees – Whether there was recommendation from present trustees – Whether there was breach of conduct or breach of fiduciary duty committed by existing trustees to warrant removal – Whether consent ought to be given by Attorney General – Government Proceedings Act 1956, s. 9*

***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Judicial review against decision of Attorney General – Applicant applied for consent from Attorney General to apply to be made as trustee or replace present trustees – Consent refused by Attorney General – Application for certiorari order to quash decision of Attorney General and mandamus order to compel Attorney General to give consent – Whether decision of Attorney General irrational or unreasonable – Rules of Court 2012, O. 53*

One deceased Cheah Leong Kean ('testator') had executed a will, codicil and trust deed to bequeath (i) four pieces of land ('lands'); (ii) RM15,000 for the construction of a pagoda on the lands; and (iii) RM5,000 to be invested and the income arising from such investments to be used to maintain the pagoda for the benefit of all Buddhist devotees and for the conduction of the Buddhist religious customs of the deity Liam Hood Tong Chor Seng Tuan. Since the death of the testator, the trustees failed to carry out the terms of the trust. In 1982, the High Court declared the lands to be a public charitable trust ('order'). The applicant, in his capacity as the Secretary of Persatuan Kebajikan dan Amal Liam Hood Tong Chor Seng Tuan ('association'), applied to the Attorney General ('respondent') for consent, under s. 9 of the Government Proceedings Act 1956 ('GPA'), so that an application could be made to the High Court for the association to be made a trustee or to replace the present trustees. However, the respondent refused to give his consent. Hence, the present application for judicial review against the decision of the respondent, under O. 53 of the Rules of Court 2012, seeking orders for (i) *certiorari* to quash the respondent's decision; and (ii) *mandamus* to compel the respondent to give consent.

**Held (dismissing application with costs):**

**(1)** To be a new trustee, the applicant should receive recommendation from the present trustees. However, the applicant failed to present evidence that there had been recommendation from the present trustees for the

A applicant to be a new trustee. Without the recommendation, the respondent had not acted in an unreasonable manner in refusing consent to the applicant. (para 23)

**(2)** There was not a shred of evidence to reflect that there had been a breach of conduct or breach of fiduciary duty committed by the existing trustees B to warrant their removal. Hence, they should be allowed to continue with their current duties. The efforts of the present trustees had been curtailed by the filing of various suits to dispute the ownership of the lands. The various suits showcased previous attempts to undermine the existing trustees which have led to the delay, if any, in the existing C trustees' need and responsibility to construct the pagoda. The respondent was privy to these attempts and suits and, therefore, the decision to refuse consent clearly did not reflect an act of irrationality or unreasonableness. (paras 24-26)

**(3)** The trust property was meant for the Buddhist communities and D categorised as public charitable trust which was governed by s. 9 of the GPA and the respondent was the custodian of a public charitable trust. As an association or a person, the applicant did not fulfil the requirement under s. 9 of the GPA which required two or more persons to apply for the respondent's consent to be trustee in a public charitable E trust. The application for the respondent's consent to transfer the lands from the present trustees appointed by the AG, under s. 9 of the GPA to the applicant, a society registered under the Societies Act 1966 ('SA'), did not fall within the ambit of s. 9 of the GPA and it contravened the law of public charitable trust. Should the applicant be allowed to do so, F the lands would be owned and controlled by the association for the benefit of its members, but not to the public at large who profess the religion of Buddhism. There was also a likelihood of danger to the lands in the event that it is registered under the SA; the association may be dissolved or de-registered. The respondent's decision not to give consent was correct and unreviewable. (paras 27-29 & 33)

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**Case(s) referred to:**

*Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223* ***(refd)***
*Bhikku Daeng & Anor v. Maung Shwe Tyn & Anor [1980] 1 LNS 5 FC* ***(refd)***
*Cheah Ewe Chong & Anor v. Cheah Kee Ee & Ors [1934] 1 LNS 9 HC* ***(refd)***
H *Children's Investment Fund Foundation (UK) v. Attorney General And Others [2018] 3 WLR 1470* ***(refd)***
*Hj Abdullah & Ors v. Ibrahim & Ors [1965] 1 LNS 48 HC* ***(refd)***
*In Re Tempest (1866) LR 1* ***(refd)***
*Ledchumanan Nagappan v. R Nadarajah & Ors [1993] 4 CLJ 253 HC* ***(refd)***
*Lee Eng Teh & Ors v. Teh Thiang Seong & Anor [1966] 1 LNS 79 HC* ***(refd)***
I *Minister for Immigration and Border Protection v. Stretton [2016] FCAFC 11* ***(refd)***
*Re London, Brighton and South Coast Rail Co [1854] 18 Beav 608* ***(refd)***

**Legislation referred to:**
Government Proceedings Act 1956, s. 9(1), (2)
Rules of Court 2012, O. 53 r. 3(2)
Trustee Act 1949, ss. 40(1), 45

*For the applicant - Ravi Chandran; M/s SC Ravi & Assocs*
*For the respondent - Shamsul Bol Hassan; SFC*

*Reported by Najib Tamby*

## JUDGMENT

**Azmi Abdullah JC**

**Introduction**

**[1]** The applicant is applying for a judicial review of the decision of the Honourable Attorney General ('AG') of Malaysia dated 17 February 2016 in refusing to give consent under s. 9 of the Government Proceedings Act 1956 ('GPA'), a prerequisite before any proceedings in court can be initiated for any of the matters listed under s. 9(2) of the GPA. The applicant brings this application in his capacity as the Secretary of the Persatuan Kebajikan dan Amal Liam Hood Tong Chor Seng Tuan (the said "association").

**[2]** The crux of the applicant's argument is that the decision of the AG is tainted with irrationality and unreasonableness. The AG is also said to have failed to take into consideration relevant facts and materials in arriving at the decision hence this court exercising its power for judicial review under O. 53 of the Rules of Court 2012 ought to grant an order for *certiorari* to quash the AG's decision and also the order for *mandamus* to compel the AG to give consent to the applicant pursuant to s. 9 of the GPA.

**[3]** These cause papers were referred to in the deliberations of this court:

(i) Application for judicial review dated 26 April 2016.

(ii) Statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012.

(iii) Affidavit in support affirmed by the applicant on 21 April 2016.

(iv) Respondent's affidavit in reply affirmed by Rosli bin Ahmad on 21 March 2019.

(v) Applicant's reply to respondent's AIR affirmed by Chin Chee Kow on 22 April 2019.

(vi) Respondent's affidavit in reply affirmed on 8 May 2019.

(vii) Applicant's affidavit in reply (3) and (4) to the respondent's AIR (2) affirmed by the applicant on 15 May 2019.

**[4]** At the leave stage to pursue this judicial review, the AG refused to grant leave to the applicant but this court decided to grant the leave on 28 September 2016 with appeal being lodged against the said decision to the Court of Appeal and the Federal Court. At both courts the respondent failed in their appeals.

**Background Facts**

**[5]** Cheah Leong Kean, deceased (the "testator") had executed a will and codicil dated 6 May 1941 and a trust deed dated 6 May 1941 wherein the testator had bequeathed the four pieces of land listed below and cash to the amount of RM15,000 for the construction of a pagoda on the lands and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan.

**[6]** The lands referred to in the will of the testator are as follows:

(i) Geran No. 20348 Lot 491.

(ii) Geran No. 20349 Lot 492.

(iii) Geran No. 5935 Lot 292.

(iv) Geran No. 20273 Lot 963.

All situated in Section 1, North East District in State of Penang (hereinafter referred to as "the said lands")

**[7]** Since the death of the testator the initial trustees had failed to carry out the building of the pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982, an order declaring the said land to be a public charitable trust was handed down by His Lordship Judicial Commissioner Mustapha bin Hussain (as His Lordship was then) and that the principles of the cy-pres doctrine be applicable.

**[8]** Since that order, the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo.

**[9]** In the 35 years that have lapsed since the said order, there has been no effort by the trustees to carry out the wishes of the testator or by way of cy-pres and the said lands have been left vacant.

**[10]** The said association comprises of the followers of the Buddhist faith and devotees of the said deity. The association frequently has religious functions and prayers to the said deity. There is currently no place of worship for the deity and the association carries out these prayers and other religious and charitable functions at makeshift premises.

**[11]** The association had endeavoured to secure funding from third parties to build the said pagoda. However, as a precondition of the said promised funding, the association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust.

**[12]** In view of the above, the association had *vide* letters dated 20 November 2014 and 6 July 2015 applied to the Honourable Attorney General of Malaysia (the AG) for consent under s. 9 of the Government Proceedings Act 1956 so that an application can be made to the High Court for the association to be made a trustee in addition to or to replace the current trustees.

**[13]** The AG *vide* a letter dated 17 February 2016 had refused to give his consent on the grounds that consent had been previously given to the current trustees on 15 March 2014. Aggrieved by decision of the AG, the association now applies to this court for judicial review of the said decision and for orders of *certiorari* and *mandamus* as prayed in this application.

**Guiding Principles**

**[14]** Wigney J in *Minister for Immigration and Border Protection v. Stretton* [2016] FCAFC 11, at p. 37, para 92:

> The critical point is that, in reviewing a decision on the ground of legal unreasonableness, the Court's role is strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision (*Minister for Immigration and Citizenship v. Li* [2013] 249 CLR 332 at [76], [105]; *Minister for Immigration and Border Protection v. Singh* [2014] 231 FCR 437 at [44]-[45]), or if the decision is within the "area of decisional freedom" of the decision-maker (*Li* at [28], [66], [105]; *Singh* at [44]), it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently. Unfortunately, and with the greatest respect to the primary judge, it is difficult to escape the conclusion that is what occurred here.

**[15]** This court is empowered to disturb the AG'S decision but the court's role is very much supervisory and should be decided on the basis of whether there has been a lawful exercise of the power provided to the AG under the statute. If appropriate considerations have been taken in arriving at the decision made by the AG then this court should refrain itself from interfering with the discretion exercised.

**[16]** In the case of *Minister for Immigration and Border Protection v. Stretton* (*supra*), the Federal Court of Australia in allowing the appeal by the Minister for Immigration and Border Protection held that the Minister of Immigration and Border Protection had properly evaluated the countervailing considerations and reached the ultimate conclusion which he did after properly weighing the relevant competing consideration. The Federal Court of Australia further stated at para. 74 that:

> It is important to bear constantly in mind in applying the head of review of legal unreasonableness the admonition that to describe reasoning as unreasonable (or irrational) may merely be an emphatic way of disagreeing with it (see *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant* S20/2002 [2003] HCA 30; [2003] 77 ALJR 1165 at [5] per Gleeson CJ and *Minister for Immigration and Citizenship v. SZJSS* [2010] HCA 48; [2010] 243 CLR 164 at [34] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). The fact that a Court exercising judicial review may disagree with a primary decision-maker's evaluation of the relevant facts and considerations in the exercise of a statutory discretionary power is insufficient of itself to justify judicial intervention.
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> Chief Justice Allsop, in *Stretton* (*supra*) had stated at paragraph 4 and 5 that:
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> > In *Minister for Immigration and Citizenship v. Li* [2013] HCA 18; 249 CLR 332, the High Court made clear that legal reasonableness or an absence of legal unreasonableness was an essential element in the lawfulness of decision-making; Parliament is taken to intend that statutory power will be exercised reasonably: see *Li* at [26] and [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J).
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> > These statements of general principle in the three judgments (French CJ, and Hayne, Kiefel and Bell JJ, and Gageler J) variously drew upon and drew together a number of well-known expressions and bodies of principle including, and without repeating all citations: the Constitutional necessity for legal control of discretion (power): *Shrimpton v. The Commonwealth* [1945] HCA 4; 69 CLR 613 at 629-630; the necessary confinement, explicit or implicit, of any statutory discretion or power by the subject matter, scope and purpose of the legislation: *Water Conservation and Irrigation Commission (NSW) v. Browning* [1947] HCA 21; 74 CLR 492 at 505; the implied legislative intention to condition statutory discretionary power by a requirement that it be exercised reasonably; *Kruger v. The Commonwealth* [1997] HCA 27; 190 CLR 1 at 36; *Abebe v. The Commonwealth* [1999] HCA 14; 197 CLR 510 at 554 [116]; *Shrimpton* at 620; *South Australian Commissioner for Prices and Consumer Affairs v. Charles Moore (Aust) Limited* [1977] HCA 38; 139 CLR 449 at 466, and *Minister for Aboriginal Affairs v. Peko-Wallsend Limited* [1986] HCA 40; 162 CLR 24 at 41-42; the necessity that a discretion be exercised according to the rules of reason and justice, not private opinion, according to law, and not humour, and within the limits that as honest and competent

person would confine herself that is "legal and regular, not arbitrary, vague and fanciful": *Sharp v. Wakefield* [1891] AC 173 at 179; *Shrimpton* at 620; *R v. Anderson; Ex parte lpec-Air Pty Ltd* [1965] HCA 27; 113 CLR 177 at 189; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59 at 62 [9]; the illegitimacy of the exercise of a discretion in reaching a conclusion that no reasonable person could ever come to: *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 at 229, or where no sensible decision-maker acting with due appreciation of his or her responsibilities would so decide: *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

**[17]** The functions of the courts and the AG as regards to charities have been succinctly explained in the case of *Children's Investment Fund Foundation (UK) v. Attorney General And Others* [2018] 3 WLR 1470, the UK Court of Appeal at paras. 51 to 53 stated:

51 Ms Cooper and the Attorney General, however, maintain that different principles apply in relation to charities. It is their case that the court can give directions to members of charitable companies (or, as appropriate, directors of such companies or trustees of charitable trusts) where it considers that expedient in the administration of the charities.

52 It is, of course, very well-established that the Attorney General and the court have important functions in relation to charities. In *Gaudiya Mission v. Brahmachary* [1998] Ch 341, 350, Mummery LJ observed that under English law charity has always received special treatment and that although not a state institution, a charity is subject to the constitutional protection of the Crown as *parens patriae*, acting through the Attorney General, to the state supervision of the Charity Commissioners and to the judicial supervision of the High Court. In *Stanway v. Attorney General* (unreported), 5 April 2000, Sir Richard Scott VC said: Charities operate within a framework of public law, not private law. The Crown is *parens patriae* of the charity and the judges of the courts represent the Crown in supervising what the charity is doing and in giving directions ... The Attorney Generals function is to make representations to the court as to where lies the public interest as he sees it.

53 Lord Pannick relied on *Construction Industry Training Board v. Attorney General* [1973] Ch 173 and *In Re J W Laing Trust* [1984] Ch 143 as demonstrating the breadth of the courts jurisdiction in relation to charities. Taking these in reverse order, the *J W Laing* case involved an application by the trustee of a charity for a scheme enabling the trustees for the time being to be discharged from an obligation to distribute capital within ten years of the settlors death. The trustee contended that the scheme should be ordered under either s. 13 of the Charities Act 1960 (dealing with cy-pres schemes) or the inherent jurisdiction of the court. Peter Gibson J decided A B C D E F G H' 2018 *The Incorporated Council*

A *of Law Reporting for England and Wales 1489* [2018] 3 WLR *Children's Investment Fund (UK) v. Attorney General* (CA) that s. 13 was not applicable, but approved the scheme in exercise of the inherent jurisdiction, taking the view, at p 155, that the requirement as to distribution of capital was inexpedient in the very altered circumstances of the charity. He had earlier, at p 153, accepted a submission that, in the context of the inherent
B jurisdiction: the court is not fettered by the particular conditions imposed by s. 13(1)(e)(iii) [of the Charities ACT 1960], but can, and should, take into account all the circumstances of the charity, including how the charity has been distributing its money, in considering whether it is expedient to regulate the administration of the charity by removing the requirement as to distribution within ten years of the settlors death.
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## Deliberations Of The Court

*Recommendation Of The Existing Trustees*

**[18]** Justice Mustapha Hussain in his judgment has made this observation
D pertaining to the appointment of other persons to be additional trustees:

> The Trustees may at their discretion at any time or times appoint another person or other persons to be an additional trustee or additional trustees provided always that the number of the trustees of these presents shall not be increased beyond nine by virtue of any such appointment as
E aforesaid.

**[19]** This court finds it pertinent to refer to s. 45 of the Trustee Act 1949 in determining the issue of the discretionary power of the court to hear an application to appoint new trustees and the necessary considerations in doing thus:

F Power of Court to appoint new trustees

> 45.(1)(a) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees wither in substitution for or in
G addition to any existing trustee or trustees, or although there is no existing trustee.

**[20]** Further, s. 40(1) of the same Act states the court or a person who has power to appoint trustee can appoint additional trustee as provided for under the will. Section 40(1) reads:

H Power of appointing new or additional trustees

> 40. (1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, ...
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> (a) the person or person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
I
> (b) ...

**[21]** Mary George in the book titled *Malaysian Trust Law* had this to say on the appointment of trustees:

> The provisions relating to the appointment, removal and retirement of trustees are dealt with in ss. 9 - 44 of the Trustee Act 1949 ... The first trustees of a trust settlement are usually appointed by settlor or testator or anyone on whom he has conferred such power of appointment. The settlor may appoint himself as a trustee. Where he has not appointed himself as trustee he has no power over subsequent appointments. He can only appoint additional trustees where he has reserved the power to do so in the trust instrument. If not, new trustee are thereafter appointed either under an express power in the trust instrument or under s. 40 of the Trustee Act 1949 unless contrary intention applies ... A person who has the power to appoint trustees can use whatever criteria he likes in making the appointment unless the criteria has been decided by the testator ...

**[22]** The above principle was also advocated by Abdoolcader (as he then was) in *Bhikku Daeng & Anor v. Maung Shwe Tyn & Anor* [1980] 1 LNS 5; [1980] 2 MLJ 184 which can be found in the following ground:

> It might perhaps be convenient at this stage to briefly refer to and set out the law with regard to the appointment of trustees by the court. The court has a general jurisdiction in regard to the appointment of new trustees where the court considers it expedient to do so. Section 45(1)(a) of the Trustee Act provides that in all cases where it is expedient to appoint a new trustee, either in substitution for or in addition to any existing trustee, and whether there is any existing trustee or not at the time of making such order. The general jurisdiction of the court is not affected either by a power in the instrument creating the trust or by the statutory power conferred by s. 40 of the Act. In a proper case the court may act notwithstanding these powers (*In Re Fauntleroy* (1839) 10 Sim 252; 59 ER 610). In *In re Tempest* (1866) LR 1 Ch App 485 Turner L.J., said that the court in exercising its discretion in appointing a trustee (1) should have regard to the wishes of the settlor if expressed in the trust instrument or clearly to be collected from it; (2) should not appoint a person with a view to the interests of some of the beneficiaries in opposition to the interests of the others; and (3) should have regard to the question whether the appointment would promote or impede the execution of the trust.

**[23]** From the facts of the case before this court, it is found that the applicant has failed to present to this court the evidence that there has been recommendation from the existing trustees for the applicant to be a new trustee. It is imperative that to be a new trustee the applicant should receive the recommendation from the existing trustee without which the AG has not acted in an unreasonable or irrational manner in refusing consent to the applicant.

A *Trustees' Alleged Misconduct*

**[24]** Based on the facts presented to this court, there is no shred of evidence to reflect that there has been breach of conduct or breach of fiduciary duty committed by the existing trustees to warrant their removal hence they should be allowed to continue with their current duties.

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**[25]** The applicant avers that the present trustees had failed to construct the promised pagoda thereby failing to execute the wishes of the donor. However, it is the observation of this court that the efforts of the existing trustees have been curtailed by the filing of various suits to dispute the ownership of the said trust lands. In Civil Suit No: 21NCvC-4-01-2015 heard by the Penang High Court 3, the beneficiaries of the donor had attempted to take back the said trust lands with the beneficiaries also challenging the position of the existing trustees. It was decided 22 March 2019 after a full trial with the suit being dismissed. The various suits elaborated in the affidavits showcase previous attempts to undermine the existing trustees which have led to the delay, if any in the existing trustees' need and responsibility to construct the pagoda.

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**[26]** The AG has been privy to these attempts and suits hence the decision to refuse consent in this matter clearly does not reflect an act of irrationality or unreasonableness.

E

*Section 9*

**[27]** It is this court's considered opinion the application for AG's consent to transfer the said trust lands from the present trustees appointed by the AG under s. 9 of GPA to the applicant, a society registered under the Societies Act 1966 does not fall within the ambit of s. 9 of the GPA and it contravenes the law of public charitable trust.

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**[28]** Should the applicant be allowed to do so then the trust lands will be owned and controlled by the society for the benefit of its members, but not to the public at large who profess the religion of Buddhism. Further, it is also to be noted that the current trustees are not members of the society and they would be allowed to perform their ritual in the pagoda. More so, there is likelihood of danger to the property in the event that it is registered under the Societies Act 1966. The society may be dissolved or de-registered by the authorities and thereafter the property shall vest with the Insolvency Department/Registrar of Society, but not with the AG/Ruler. Therefore, pursuant to the indenture, the trust property is meant for the Buddhist communities and it is categorised as public charitable trust which is governed by s. 9 of the GPA and the AG is the custodian of public charitable trust and none others.

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**[29]** As an association or a person, the applicant does not fulfil the requirements under s. 9 of the GPA, whereby the provision requires two or more persons to apply for the AG's consent to be trustee in a public charitable trust. It is apparent that the application by the applicant to be trustee does not satisfy the requirements of s. 9 of the GPA which make it mandatory to be made by two or more persons. The respondent had failed to fulfil the criteria in s. 9(1) of GPA. The respondent had failed to show " ... the Attorney General or two or more persons having an interest in the trust ..."

**[30]** Subsection 9(2) of the GPA makes it mandatory to comply with sub-s. 9(1):

> (2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.

**[31]** In *Ledchumanan Nagappan v. R Nadarajah & Ors* [1993] 4 CLJ 253, Mahadev Shankar J (as he then was), in addressing the mandatory element of s. 9 of GPA held as follows:

> The Attorney General's representative was in Court although not named as a party. The Attorney-General's view was that as there had been a total failure to comply with the three preliminary requirements this action should not be allowed to proceed. These were the existence of at least two persons having an interest, the prior written consent of the Attorney General, and the suit itself being brought in the name of the Attorney General.
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> With respect, this Court agreed wholly with the Attorney General and Counsel for the defendants. On this ground alone this action and the application was wholly misconceived and failed.

**[32]** Further in *Re London, Brighton and South Coast Rail Co* [1854] 18 Beav 608, the Master of the Rolls (Sir John Romilly) said that: 'The land being part of a charity estate, the petition must be sanctioned by the Charity Commissioners' certificate, and must be intituled in the matter of the stat. of 52 Geo, 3, C 101, must have the fiat of the Attorney-General, and be signed by two individual petitioners and not by a corporation and an individual.'

**[33]** Applying the above legal principle to our case, it is found that the application by the applicant to transfer the trust lands from individual trustees to society does not fall within the ambit of s. 9 of the GPA and the AG's decision not to give consent was correct and unreviewable.

**[34]** Section 9 of the GPA is hereby produced with the section clearly stating that:

> In the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the

A Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of:

(a) asserting any interest or right in the trust property;

B (b) removing any trustee;

(c) appointing a new trustee; (d) - (i) ...

(2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.

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(3) Subject to subsections (1) and (2), all suits and proceedings in any court relating to any such trust as is therein referred to or otherwise in which the Government is interested, or in which the interests of the public are affected, or in which if brought in England the Attorney General of England would be, or would be made, a necessary party as plaintiff or

D defendant, whether by himself or by relation or parties, shall be brought and had in the name of the Attorney General as plaintiff or defendant; and the Attorney General shall have and exercise therein the same rights, duties, and powers as the Attorney General of England would have and exercise in England in similar cases so far as the circumstances of Malaysia admit.

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**[35]** The intention of the Legislature when drafting s. 9 of the GPA has been clearly stated in the explanatory note to the Act which is as below:

Clause 9 authorise the Attorney-General to seek the directions of the Court for the protection of public religious, social or charitable trust.

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**[36]** The above justification for legislation too can be found in the case of *Cheah Ewe Chong & Anor v. Cheah Kee Ee & Ors* [1934] 1 LNS 9; [1934] 1 MLJ 212, whereby Whitley J said:

It is important to note that under either method no proceedings could be instituted without the approval in one form or another of the Attorney-

G General, and the reasons for insisting upon this safeguard in such cases are clearly set out by Eldon, L.C., in two of his judgments.

In the case of the *Attorney-General v. Green 1 Jacob & Walker* 303, he observes:

H It is the duty of the Court to take care that as little expense as possible should be incurred by the charity estate.

I apprehend the Legislature was very careful when it passed that Act (Romilly's) seeing that some abuses might arise from the proceeding by petition to provide that no one should proceed in that way without the approbation of the Attorney General or the

I Solicitor-General. Here it was presented without that sanction ... It is clear that the order on the petition must be considered as a nullity.

In *ex parte Skinner, In re Lawford Charity 2 Merivale* 453, he said: A

> The intention of the legislature in framing the Act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the B legislature provided for the signature of the Attorney General, or, in case there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information. C

**[37]** This decision was subsequently followed by MacIntyre J in *Hj Abdullah & Ors v. Ibrahim & Ors* [1965] 1 LNS 48; [1965] 2 MLJ 189 wherein His Lordship said:

> Section 9(1) of the Government Proceedings Ordinance, 1956 lays down D the rule that where certain specified reliefs mentioned therein are sought by way of a suit in relation to any alleged breach of any express or constructive trust, or in regard to the administration of any trust for public, religious, social or charitable purposes, the Attorney-General or two or more persons with the written consent of the Attorney-General may institute the necessary proceedings in court. E
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> Sub-section (2) of s. 9 merely emphasises the necessity to conform to the provisions of sub-section (1) if any of the reliefs mentioned therein are claimed.
>
> Sub-section (3) lays down the rule that except as to the procedure to be followed in obtaining the reliefs specified in sub-sections (1) and (2), all F other suits and proceedings relating to any such trust or otherwise in which the Government is interested, or in which the interest of the public are affected, or which if brought in England the Attorney-General of England would be a necessary party, shall be brought and had in the name of the Attorney-General as plaintiff or defendant.
>
> Since the reliefs claimed in the present action are brought on behalf of G a charitable trust and are not among the claims specified in sub-section (1), I hold that sub-section (3) applies and that the suit should have been brought and had in the name of the Attorney-General.

**[38]** Along the same vein, Gill J had decided in *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1966] 1 LNS 79; [1967] 1 MLJ 42: H

> In the present case the money collected for the building of the school constituted a charitable fund. It is for this reason that a consent was obtained from the Attorney-General and he was added as a party by being named as the fourth plaintiff. It is clear that but for the consent of the Attorney-General or his being made a party to the action, the present I action would not be maintainable.

**[39]** The intention of the Legislature in the framing of s. 9 of the GPA is to empower the AG in the protection of charitable trusts from abuse and to prevent proceedings affecting the charity funds. Based on the available facts presented to this court there is no unreasonableness or irrationality in the AG's refusal to give consent to the applicant.

*Tripartite Agreement*

**[40]** The applicant in entering the tripartite agreement with a third party dated 7 November 2014 to build a pagoda but never informed or sought the AG's consent nor the existing trustees thus this can be interpreted as an attempt to circumvent the AG and the existing trustees in seizing control of the public charitable trust and more pertinently it is against the donor's intention in respect of the appointment of trustees in the deed of gift dated 6 March 1941.

**[41]** As there was never an appointment by the current trustees for the applicant to enter into as such, the applicant lacks the *locus standi* to contract on behalf of the current trustees for the erection of the pagoda.

*Test to Interfere*

**[42]** Whilst it is true that the court may interfere when an administrative decision on an competent matter is so unreasonable that no reasonable authority could ever have come to it, the court however requires something overwhelming in the proving of such a case. Furthermore, the standard of 'unreasonableness' is what a sensible person considered unreasonable, and not what the court considered as unreasonable. This was explained by Lord Greene in the *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223 (*Wednesbury* case) at p. 230 as follows:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; **but to prove a case of that kind would require something overwhelming**, and in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable man in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the

> legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.
>
> (emphasis added)

## Conclusion

**[43]** This court observes that of prime consideration by the court at this judicial review stage is to determine whether an unreasonable or irrational decision has been made by the AG. In order to decide, the court reminds itself that the function of the court herein is supervisory and not to exercise an appellate function. The distinct issue is whether the AG has exercised his function correctly under s. 9 of the GPA.

**[44]** It is for the applicant to show that the AG acted unreasonably but as long as the exercise of discretion is without improper motive, the exercise of discretion must not be interfered with by the court unless there is a misdirection of law, or of irrelevant matters having been taken into consideration or relevant matters had not been taken into consideration or the object of the statute had not been appraised.

**[45]** Bearing in mind the argument by the applicant that the issues raised should only be deliberated when the court proceedings proper is initiated, it is the court's opinion that in order to determine whether the consent is validly refused by the AG, it is unavoidable to inspect and examine the issues that became the foundation of the AG's decision.

**[46]** The judgment of Mustapha Hussain has stated that the trustees may at their discretion at any time or times appoint another person or other persons to be an additional trustee or add trustees provided and always that the number of the trustees of those present shall not increase beyond nine by virtue of any such appointment as aforesaid.

**[47]** This is in line with the decision in *Bhikku Daeng & Anor v. Maung Shwe Tyn & Anor* (*supra*) which quotes *In Re Tempest* (1866) LR 1 in which Turner LJ said that the court should have regard to the wishes of the settlor if expressed in the trust instrument or clearly to be collected from it.

**[48]** From this, it is observed that recommendation of the existing trustees should be obtained in order to be new trustees and in this case in the absence of such recommendation (which is not reflected in the affidavits), the AG in not giving consent cannot be deemed to have been acting unreasonably or irrationally.

**[49]** From the affidavits, it is also observed that there have been previous attempts to usurp the existing trustees by the filing of previous suits. The applicant has been mute in not putting forth these attempts in the affidavits filed hence this court deems that the AG armed with this knowledge of those attempts which should be within his records and knowledge is justified in refusing to give consent.

**[50]** It can also be gathered that the existing trustees have actually been hampered by the existence of the previous suits in their efforts to construct the pagoda hence the applicant's effort to substitute the existing trustees upon this reasoning is not founded upon valid foundations.

**[51]** The court requires an overwhelming reason in order to interfere with an administrative decision and in this judicial review this court is convinced that such standard has not been fulfilled. This court thus finds that there is no irrationality and unreasonableness in the AG's decision to refuse consent that warrants the court's intervention.

**[52]** Though it is averred that the applicant has the intention to cooperate with the existing trustees, this has not at all been shown and the entry of the tripartite agreement without any consultation with the existing trustees has rather showcased the real intention of the applicant which is not as has been averred pertaining to the willingness to cooperate.

**[53]** Based on these deliberations, this judicial review is thus dismissed with costs.